

Azam Anwar, M.D. Individually
and on Behalf of
Endovascular Support Systems,
Inc., and Benito Hidalgo,
Individually and on Behalf of
Endovascular Support Systems,
Inc., a California corporation,

plaintiffs,

y.

Arterial Vascular Engineering, Inc., a Delaware corporation, Simon H. Stertz, M.D., Gerald Dorros, M.D., John Miller and Bradley Jendersee.

defendants.

In the District Court of

Dallas County, Texas

298th Judicial District

PLAINTIFFS' EIGHTH AMENDED PETITION

Plaintiffs Azam Anwar, M.D. ("Anwar") and Benito Hidalgo ("Hidalgo"), both individually and on behalf of Endovascular Support Systems, Inc. ("ESS"), (collectively "plaintiffs") bring this action complaining of Arterial Vascular Engineering, Inc. ("AVE"), Simon H. Stertzer, M.D. ("Stertzer"), Gerald Dorros, M.D. ("Dorros"), John Miller ("Miller"), and Bradley Jendersee ("Jendersee") (collectively "defendants") on grounds of, among others, fraud, misrepresentation, violations of state securities laws, statutory fraud, control person and aider-and-abettor liability, civil conspiracy, breach of fiduciary duty, constructive fraud, breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing.

The Parties

1. Anwar is a resident of Dallas County, Texas. Hidalgo is a resident of California. Each brings this action on his own behalf and on behalf of ESS, a corporation that the defendants allege was merged into defendant AVE. The plaintiffs believe, and upon information and belief allege (for the reasons stated in this Amended Petition), that the merger was procured by fraud and breach of fiduciary, and thus, the merger is void.

2. ESS is and was a California corporation incorporated on or about November 3, 1989. This action is brought for and on behalf of ESS by Anwar and Hidalgo. ESS was formed to develop and market medical devices, including coronary stents. Coronary stents are metal devices inserted into arterial passageways and are used to treat atherosclerosis. During the period material to the allegations in this Amended Petition, specifically 1991 through January 1995, Anwar and/or Hidalgo were shareholders of ESS, and each was owed fiduciary duties by defendants Stertz, Dorros, Miller, and Jendersee, given that each of those defendants was an officer, director, and/or controlling shareholder of ESS and AVE. Both Anwar and Hidalgo assert individual claims for the misconduct alleged herein and have standing to prosecute this claim for and on behalf of ESS and the shareholders of ESS. Defendant AVE, acting in concert with defendants Stertz, Dorros, Miller, and Jendersee, later purported to merge ESS into AVE. The plaintiffs believe, and upon information and belief allege, that AVE acquired its interest in ESS in violation of statutory and common law duties owed to the plaintiffs (all as described in this Amended Petition) and, as a result, the merger is void because it was procured by fraud and breach of fiduciary duty.

3. AVE is a Delaware corporation that maintains its principal place of business in the State of California. AVE has engaged in business in Texas sufficient to satisfy both general and specific jurisdiction standards. AVE has ongoing and systematic contacts with the State of Texas. For example, AVE has systematically solicited sales of securities in the State of Texas, promoted itself in the State of Texas, conducted board and shareholder meetings in the State of Texas, hired employees in the State of Texas, conducted training sessions in the State of Texas, solicited business transactions in the State of Texas, engaged in extensive and ongoing sales activities in the State of Texas, and otherwise promoted its business interests in the State of Texas. AVE is subject to general jurisdiction in the State of Texas pursuant to Tex. Civ. Prac. & Rem. Code § 17.042 and is subject to specific jurisdiction by, among other things: (i) contracting by mail or otherwise with a Texas resident when either party was to perform the contract in whole or in part in this State, (ii) committing a tort in whole or in part in this State, and (iii) upon information and belief, soliciting business in the State of Texas. During the period covered by this Amended Petition, AVE, in violation of Tex. Sec. Act art. 581-33 *et seq.*, disseminated false and misleading information to the plaintiffs, including plaintiff Anwar, a resident in the State of Texas, omitted to state facts necessary to make the statements made by AVE not misleading, and engaged in acts, practices, and a course of business that operated as fraud and deceit upon the plaintiffs, including Anwar, who purchased shares of stock in AVE and/or ESS. AVE does not maintain a place of regular business in Texas and has no designated agent for service of process in this State. AVE has entered an appearance in this case and may be served through its counsel of record.

4. Stertzter is a resident of California who has conducted business in the State of Texas. Stertzter has engaged in business in the State of Texas sufficient to satisfy both general and specific jurisdiction standards. Stertzter has had ongoing and systematic contacts with the State of Texas sufficient to subject him to jurisdiction in Texas, including, without limitation, engaging in the conduct outlined in the Tex. Civ. Prac. & Rem. Code § 17.042. During the period covered by this Amended Petition, Stertzter has engaged in business in Texas by, among other things: (i) contracting by mail or otherwise with a Texas resident when either party was to perform the contract in whole or in part in this State, (ii) committing a tort in whole or in part in this State, and (iii) upon information and belief, soliciting business in the State of Texas. During the period covered by this Amended Petition, Stertzter, in violation of Tex. Sec. Act art. 581-33 *et. seq.*, disseminated false and misleading information to the plaintiffs, including plaintiff Anwar, a resident in the State of Texas, omitted to state facts necessary to make the statements made by Stertzter not misleading, and engaged in acts, practices, and a course of business that operated as fraud and deceit upon the plaintiffs, including Anwar, who purchased shares of stock in AVE and/or ESS. Stertzter has no designated agent for service of process in this State. Stertzter has entered an appearance in this case and may be served through his counsel of record.

5. Dorros is a resident of Wisconsin who has conducted business in the State of Texas. Dorros has engaged in business in Texas sufficient to satisfy both general and specific jurisdiction standards. During the period covered by this Amended Petition, Dorros has had ongoing and systematic contacts with the State of Texas sufficient to subject him to jurisdiction in Texas, including, without limitation, engaging in the conduct outlined in the Tex. Civ. Prac. & Rem. Code § 17.042. Dorros has engaged in business in Texas by, among other things: (i)

contracting by mail or otherwise with a Texas resident when either party was to perform the contract in whole or in part in this State, (ii) committing a tort in whole or in part in this State, and (iii) upon information and belief, soliciting business in the State of Texas. Upon information and belief, the plaintiffs allege that Dorros disseminated false and misleading information to the plaintiffs, including plaintiff Anwar, a resident in the State of Texas, omitted to state facts necessary to make the statements made by Dorros not misleading, and engaged in acts, practices, and a course of business that operated as fraud and deceit upon the plaintiffs, including Anwar, who purchased shares of stock in AVE and/or ESS, all in violation of Tex. Sec. Act art. 581-33 *et seq.* Dorros has no designated agent for service of process in this State. Dorros has entered an appearance in this case and may be served through his counsel of record.

6. Miller is now a resident of California who has conducted business in the State of Texas. Miller has engaged in business in Texas sufficient to satisfy both general and specific jurisdiction standards. Miller has had ongoing and systematic contacts with the State of Texas. During the period covered by this Amended Petition, Miller was a resident of New York who conducted business in the State of Texas. During this period, Miller was the accountant and financial advisor to both Anwar and Hidalgo, performed accounting and financial advisory services for ESS and AVE, and had superior knowledge about the business, prospects, and financial condition of ESS and AVE, and virtually all of their shareholders. The relationship between Anwar and Hidalgo on the one hand and Miller on the other hand was one of trust and confidence. Miller was, in fact and law, a fiduciary to Anwar, Hidalgo, and ESS. Thus he owed them a duty of utmost good faith, fairness, honesty in fact, and was obligated to insure that he did not place his individual interests, or the interests of AVE and the other defendants, ahead of

Anwar, Hidalgo, and ESS. In addition, Miller was a director and officer of AVE, an officer and/or financial advisor to ESS, or one who possessed superior knowledge of the financial affairs of both ESS and AVE and therefore, as such, owed fiduciary responsibilities to Anwar, Hidalgo, and ESS. Miller is subject to jurisdiction in the State of Texas pursuant to Tex. Civ. Prac. & Rem. Code § 17.042 by, among other things: (i) contracting by mail or otherwise with a Texas resident when either party was to perform the contract in whole or in part in this State, (ii) committing a tort in whole or in part in this state, and (iii) upon information and belief, soliciting business in the State of Texas. During the period covered by this Amended Petition, and in violation of Tex. Sec. Act art. 581-33 *et seq.*, Miller disseminated false and misleading information to the plaintiffs, including plaintiff Anwar, a resident in the State of Texas, omitted to state facts necessary to make the statements made by Miller not misleading, and engaged in acts, practices, and a course of business that operated as fraud and deceit upon the plaintiffs, including Anwar, who purchased shares of stock in AVE and/or ESS. Miller has entered an appearance in this case and may be served through his counsel of record.

7. Jendersee is a resident of California who has conducted business in the State of Texas, and who was until 1991, a resident of the State of Texas who maintained his principal place of business in the State of Texas. Subsequent to 1991, Jendersee has been a resident of the State of California. Jendersee has engaged in business in Texas sufficient to satisfy both general and specific jurisdiction standards. Jendersee has had ongoing and systematic contacts with the State of Texas. Jendersee has engaged in business in Texas and is subject to jurisdiction in the State of Texas pursuant to the Tex. Civ. Prac. & Rem. Code § 17.042 by, among other things: (i) contracting by mail or otherwise with a Texas resident when either party was to perform the

contract in whole or in part in this State, (ii) committing a tort in whole or in part in this State, and (iii) upon information and belief, soliciting business in the State of Texas. During the period covered by this Amended Petition, Jendersee, in violation of Tex. Sec. Act art. 581-33 *et seq.*, disseminated false and misleading information to the plaintiffs, including plaintiff Anwar, a resident in the State of Texas, omitted to state facts necessary to make the statements made by Jendersee not misleading, and engaged in acts, practices, and a course of business that operated as fraud and deceit upon the plaintiffs, including Anwar, who purchased shares of stock in AVE and/or ESS. Jendersee has no designated agent for service of process in this State. Jendersee has entered an appearance in this case and may be served through his counsel of record.

Venue Facts

8. The individual defendants, Stertz, Dorros, Miller, and Jendersee, acting in concert with AVE and others, were “controlling persons” of ESS and AVE under Delaware and California law, respectively, and as that term is used in Tex. Sec. Act art. 581-33 *et seq.* As such, and by virtue of their high-level positions in ESS and AVE, each individual defendant participated in and/or had actual awareness of each company’s operations and knowledge of each company’s condition and had the power to influence and control, and did influence and control, directly or indirectly, the decision making of ESS and AVE, including both the day-to-day and long-term strategic decisions respecting ESS and AVE that are the subject matter of the complaints alleged herein. Each of the individual defendants was provided with and had unlimited access to information concerning ESS and AVE including, without limitation, the information necessary to prevent the fraud that is alleged in this Amended Petition.

9. Venue is proper in Dallas County, Texas under sections 15.002 and 15.005 of the Texas Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to the causes of action occurred in Dallas County, Texas, and because Anwar was, and still is, a resident of Dallas County, Texas at the time the causes of action accrued.

10. Alternatively, venue is proper in this county because, among other things, Anwar is a resident of the State of Texas, and the causes of action alleged herein arose in whole or in part in this county, and under the public policy expressed in this state, the doctrine of *forum non conveniens* does not apply to litigation in which the plaintiff is a resident of the State of Texas. Moreover, venue in Dallas would not constitute a considerable inconvenience to any of the defendants under the facts and circumstances of this case.

Substantive Allegations

Introduction

11. The events relevant to this Amended Petition began in 1983 when plaintiff Hidalgo met defendants Stertz and Miller. At that time, Miller and Stertz were residents of New York. Hidalgo was a technician who specialized in providing laboratory and other services necessary to perform balloon angioplasty services and who assisted Stertz in his use of the devices. Balloon angioplasty was then a new technique used to treat coronary disease. Hidalgo and Stertz played significant roles in the development of the techniques and processes necessary to validate the treatment. During the years 1983 through 1990, Stertz became Hidalgo's trusted professional mentor, and both became well known in the field of coronary heart disease treatment. During this period, Hidalgo and Stertz developed a close personal and

business relationship of trust and confidence, and in fact and in law, Stertzer became a fiduciary to Hidalgo. As a result of this fiduciary relationship, Stertzer owed Hidalgo a duty of utmost good faith, candor, fairness, and honesty in fact.

12. Some time in the 1980's, Stertzer introduced Hidalgo to defendant Miller. At the time, Miller was Stertzer's financial advisor and accountant. At Stertzer's suggestion and recommendation, Miller began providing financial, accounting, and investment advisory services and/or advice to Hidalgo and continued to provide those services and/or advice through at least January 1995. During this period while Miller was Hidalgo's accountant and financial advisor, Miller owed Hidalgo fiduciary duties of utmost good faith, fairness, and honesty in fact.

13. In 1983, Stertzer moved to the State of California and conducted his practice at Seton Hospital in San Francisco, California. At Stertzer's request, Hidalgo operated as Stertzer's chief technician, and the two became close personal friends and confidantes. The fiduciary relationship between Stertzer and Hidalgo, which began in 1983, continued through the period covering the conduct challenged in this Amended Petition.

Development of the Stent Technology

14. In 1989, Hidalgo, working with Michael Boneau and Stertzer, began developing a stent that was intended to be used to treat coronary disease. At the time, stent technology was in its infancy. The stents that were then on the market and approved by the FDA had only limited use. The stent that was ultimately developed became known as the "Boneau stent," which ultimately became the technical and legal foundation of AVE's current stent products. A key design feature of the stent, the helical joiner method, was the specific idea of Hidalgo. This design feature was instrumental in making the Boneau stent, and its successors, successful. The

design was a key feature that became part of the patent that was ultimately awarded by the United States Patent Office. The plaintiffs allege that each of the stents manufactured or sold by AVE have incorporated the design, features, processes, and/or methods defined as "Inventions" owned by ESS.

15. ESS was incorporated in 1989 for the purpose of developing and marketing the medical device that became known as the Boneau stent. Stertz, Boneau, and Hidalgo each owned 33 1/3% of the stock of ESS. Stertz, however, exerted actual control over the company. For example, Stertz called board and shareholder meetings (which usually took place in his office), selected the accountant (who was Miller) used to handle the day-to-day accounting, and used advice from Miller's attorney (who was Richard Blumenthal) to handle the legal needs of ESS. Although Hidalgo was a significant shareholder of ESS, Stertz, acting in concert with Miller and Blumenthal, controlled ESS in every way.

16. Plaintiff Anwar met Stertz, Hidalgo, and Miller while he was on a fellowship in California in 1990. Over time, Anwar became a friend of Stertz and viewed Stertz as a friend, mentor, and advisor. As a result, Anwar developed a close relationship with Stertz, a relationship built on trust and confidence that, in fact and in law, made Stertz a fiduciary of Anwar. As a result of this relationship, Stertz owed Anwar a duty of utmost good faith, candor, fairness, and honesty in fact.

17. In early 1992, at the suggestion and recommendation of Miller, Anwar agreed to purchase 15% of the stock in ESS from Boneau, who then owned 33 1/3% of the stock in ESS. Defendant Dorros purchased a similar amount from Boneau. Miller recommended this purchase to Anwar because he recognized the value of the technology and affirmatively represented that

the investment in ESS would be profitable to the shareholders. Miller undertook to prepare the necessary documentation for the transfer, and working with attorney Richard Blumenthal, Miller prepared the purchase and sale documents necessary to effectuate the transfer. These documents were forwarded to Anwar at his office in Texas. After this transaction, the ESS shareholders and their respective interest in ESS were as follows: Hidalgo and Stertzner each owned 33 1/3%, Anwar and Dorros each owned 15%, and Boneau owned 3.33%.

18. Anwar assisted in the development of the Boneau stent. He conducted research on the stent and prepared papers for presentation to experts in the field of cardiology, and his efforts assisted in obtaining patent rights for the device.

19. Stertzner, Dorros, and Jendersee were officers, directors, and/or controlling shareholders of ESS during periods from 1991 to 1995. During these periods, Miller was, in fact, the chief financial officer of both ESS and AVE and knew more about the business and prospects of both companies than anyone else. In their capacities as such, Stertzner, Dorros, Jendersee, and Miller each owed fiduciary responsibilities to all shareholders of ESS. These fiduciary responsibilities included, without limitation, a prohibition against (i) using their position of trust and confidence to further their own private interests, and (ii) self-dealing, along with a requirement that they not allow their personal interests to prevail over the interests of ESS and its shareholders. In addition, each had affirmative duties to disclose all material facts relating to any transaction in which they were involved. ESS was controlled, in fact, by Stertzner, Dorros, Jendersee, Miller, and AVE.

Formation of AVE

20. At a time unknown to the plaintiffs, but believed to have been July 30, 1991, Stertzer and Dorros formed a Delaware corporation that is now known as Arterial Vascular Engineering, Inc. At the time of its formation, Stertzer and Dorros were the sole shareholders of AVE and along with Miller, controlled AVE. They are and have remained "control persons" of AVE as that term is used in Tex. Sec. Act art. 581-33 *et seq.*; California securities law sections 25401, 25501, and 25504; California and Texas case law; and Delaware law. Anwar was told before he became a shareholder of AVE that AVE was formed to develop balloon angioplasty medical devices. The plaintiffs were not told, however, that AVE and its control persons, from AVE's early days, believed that stents were a significant part of the AVE plan and that AVE had actively evaluated the economic benefits of stents and, in particular, the stent and other knowledge and technology owned by ESS. Neither Hidalgo nor Anwar were ever informed that the defendants had planned to obtain control of, use, and develop the ESS stent technology before AVE was ever formed.

21. Stertzer, Dorros, Miller, and Jendersee owed fiduciary responsibilities to all shareholders of ESS, and the plaintiffs, including, without limitation, a prohibition against (i) using their positions of trust and confidence to further their own private interests, and (ii) self-dealing, along with a requirement that they not allow their personal interests to prevail over the interests of ESS and its shareholders. In addition, they had affirmative duties to disclose all material facts relating to any transaction in which they were involved.

22. Starting as of the formation of AVE, Miller was the chief financial officer, financial advisor, and a director of AVE, and he retained these positions throughout the period

covered by this Amended Petition. In addition, Miller brought in his trusted friend and advisor, Richard Blumenthal, to act as counsel to AVE. During the period covered by this Amended Petition, Blumenthal provided legal services to AVE and its directors. Moreover, although Blumenthal has denied representing ESS, Jendersee (who was ESS's president) has testified that Blumenthal represented ESS, and documents indicate that Blumenthal may have provided legal advice to ESS. If Jendersee's testimony is correct, Blumenthal owed a duty to each corporation and also, by virtue of such representation, owed duties to the shareholders of each.

23. The original founders of AVE (Stertz, Dorros, Miller, and Jendersee) have referred to themselves as the "Founding" shareholders. When AVE was formed, each founder agreed that he would not take steps or undertake action that would dilute the Founders' respective interests or control over AVE. To accomplish this, they agreed to issue stock or stock options, as necessary, to insure control or to otherwise limit dilution of their controlling interest. This "Founders Agreement" was not made a part of the corporate records of AVE and was not disclosed in the private placement memoranda, or in any documents filed of record. Although Anwar became a shareholder of AVE in 1992 and Hidalgo became one in 1995, neither was ever informed of either the existence of this Founders Agreement or of the terms of any private arrangement between these controlling shareholders.

24. Stertz, Dorros, and Miller stated that AVE was formed to develop balloon angioplasty medical devices. This representation was made to Anwar and Hidalgo, and at the time it was made, it was false. Anwar and Hidalgo believe, and upon information and belief allege, that AVE had, as part of its initial plan, the goal of acquiring the Boneau stent technology, which was then owned by ESS. This stated goal was never disclosed to Anwar and Hidalgo.

The Joint Venture

25. Shortly after the formation of AVE, ESS and AVE entered into a joint venture, the purpose of which was to develop a delivery system for the Boneau stent. A delivery system is the means by which the stent is inserted into a vessel. The delivery system is important, and the ease of use and flexibility have a large impact on the marketability of the stent itself. Anwar and Hidalgo believe, and upon information and belief allege, that the delivery system was developed in the joint venture, that it was invented by both representatives of ESS and AVE, that it was to be for the benefit of both ESS and AVE respectively, and that each would have joint ownership of the technology developed at the time.

26. At the time of the joint venture, ESS and AVE were controlled by Stertzer, Dorros, Miller, and in the case of AVE, Jendersee, and, upon information and belief, the terms of the joint venture were dictated by them. But each of them had a disabling conflict of interest in the venture, and the material terms of the joint venture were not approved or negotiated between disinterested parties. Thus, Stertzer, Dorros, Miller, and Jendersee had an affirmative obligation and duty to insure that the transaction was entirely fair to the shareholders of both ESS and AVE. The plaintiffs believe, and upon information and belief allege, that the joint venture (i) was owned and/or should have been owned by ESS and AVE, (ii) was not fair to ESS, and (iii) neither Stertzer, Dorros, Miller, nor Jendersee undertook any effort at all to insure that the terms of the joint venture transaction were fair.

27. The joint venture was successful in developing a delivery system for the Boneau stent. Although the delivery system was a product of the joint venture efforts of ESS and AVE, the technology rights and ownership of the delivery system, which was developed under the joint

venture, were appropriated by AVE. The plaintiffs believe, and upon information and belief allege, that Stertzer, Dorros, Miller, and Jendersee, with the active participation of AVE and the co-conspirators, (i) breached their fiduciary responsibilities to ESS and its shareholders by not insuring that the transaction was entirely fair to ESS, and (ii) transferred the technology rights to the delivery system to AVE because of the potential financial benefit to themselves. This act of self-dealing was concealed from plaintiffs Anwar and Hidalgo.

The Transfer of ESS Technology to AVE

28. By 1992, the rights to the Boneau stent technology constituted substantially all of the assets of ESS. At the time, applications to obtain patent rights to the Boneau stent were on file with the United States Patent Office, but no patent had yet been issued. In the summer and fall of 1992, Stertzer, Dorros, Miller, and Jendersee, acting in concert with AVE and the other co-conspirators, made a decision to divert the ESS technology, and in particular the Boneau Stent, from ESS to AVE. They first transferred the know-how and technology from ESS to AVE in the summer of 1992. This transfer was made without either board or shareholder approval and without compensation or consideration of any kind to ESS. Thereafter, Stertzer, Dorros, and Miller, acting as officers, directors, and/or fiduciaries of ESS, circulated among themselves a resolution purporting to be from the ESS Board and authorizing the officers of ESS to enter into an agreement for the sale and transfer of substantially all of the assets of ESS, including its technology and patent applications, to AVE. AVE, for its convenience, used a company called Proprietary Extrusion Technologies, Inc. ("PET") for the acquisition. At the time, PET was a wholly owned "shell" of AVE. Its directors included Stertzer, Dorros, Miller, and Jendersee, and it was controlled in fact and in law by each defendant, including AVE. This resolution, allegedly

dated September 30, 1992, was actually signed, upon information and belief, in 1993 and then back-dated.

29. Stertzer, acting in concert with Miller and with the assistance of the co-conspirators, including Richard Blumenthal, then prepared a purchase and sale agreement, allegedly dated October 1, 1992, whereby all of the assets of ESS were purportedly sold to AVE for \$1.00. The principal asset entitled "Inventions" included all the know-how, rights, and patent rights of ESS. In return, AVE agreed to pay a royalty to ESS based upon the percentage of net sales in Europe or in the United States. The royalties were to last for 10 years, or for the life of all patents AVE received from the "Inventions," including products adapted from the Boneau stent, whichever was longer. This agreement was never signed by an authorized representative of ESS but was, upon information and belief, back-dated by Stertzer, Miller, or others unknown. Finally, the defendants, acting in concert with the other co-conspirators, took over the patent effort, once the defendants learned that preliminary approval of the patent had been obtained. This was done without the knowledge and/or informed consent of the plaintiffs.

30. At the time of the alleged transfer, Stertzer, Dorros, Miller, Jendersee, AVE, and the attorneys for both ESS and AVE had a financial interest in AVE and stood to gain great financial benefits from the transfer. Furthermore, each owed ESS and its shareholders a duty of candor and complete disclosure and were obligated to insure that any such transaction was entirely fair, just, and reasonable to ESS and its shareholders. Anwar was not informed of the efforts to transfer the Boneau stent technology, the terms of the agreement, or the value of the technology, and he had no say so in the transaction. The defendants had, in their possession, information demonstrating that the stent had great commercial value. They never disclosed this

information to the plaintiffs. Upon information and belief, the plaintiffs allege that this self-dealing transaction was designed to shift the value of the ESS technology to Stertzer, Dorros, Miller, Jendersee, AVE, and others, in violation of the defendants' fiduciary responsibilities.

31. The purported effort to transfer the technology was void under then-existing California law because the transfer of substantially all of the assets of ESS was not approved by the shareholders. The controlling shareholders and/or directors of ESS made no attempt to obtain that approval.

32. Stertzer, Dorros, and Miller, by virtue of their fiduciary relationships, had conflicts of interest with respect to the ESS sale of technology, and under those circumstances, owed an obligation to the shareholders of ESS to demonstrate that the purported transaction was entirely fair to each of the shareholders of ESS. Jendersee and AVE's counsel were aware of the duties owed by Stertzer, Dorros, and Miller and aided and abetted them in their breach. The plaintiffs believe, and upon information and belief allege, that (i) the transaction was unfair to ESS and its shareholders, (ii) no effort was made to determine whether the transaction was fair, and (iii) the defendants' conduct eliminated the plaintiffs' rights to exercise their individual rights as shareholders, including the individual right to a meaningful vote on the transfer.

The April and May Meetings

33. Some time in early 1993, the defendants and co-conspirators discovered that their effort to transfer the technology from ESS had been ineffective. As a result, Stertzer called a directors meeting of ESS for April 23, 1993, which was scheduled to be held in Stertzer's office in California. At the time, the ESS shareholders and their respective interest in ESS were as follows: Hidalgo 33 1/3%, Stertzer 33 1/3%, Anwar 15%, Dorros 15%, and Boneau 3.33%.

Only Hidalgo, Stertz, and Boneau attended the meeting, which was allegedly scheduled in order to ratify the sale of technology from ESS and to authorize the liquidation of ESS. At the meeting, Stertz's effort to obtain ratification of the illegal sale and liquidation of ESS was rejected by the ESS shareholders.

34. After this first effort failed, Stertz called another directors and/or shareholders meeting of ESS to be held on May 27, 1993, once again at his office in California. In advance of the meeting, Stertz, Miller, and others solicited proxies, including sending a solicitation to Anwar at his office in Texas. The solicitation was not accompanied by the information required by law. In fact, the request for proxy was false and misleading because it was not accompanied by the full disclosure of material information necessary to allow the shareholders of ESS to make an informed decision at the meeting. The meeting was attended in person by Stertz, Boneau, and Hidalgo. At the meeting, Stertz represented that (i) the Boneau stent had no prospect for the future, (ii) ESS had failed to develop a delivery system for the stent, (iii) the negotiations for the sale of assets between ESS and AVE were conducted in an arms-length fashion, (iv) significant efforts had been made to "auction" ESS and/or the stent to third parties without success, and (v) the value to be received by ESS and its shareholders was fair and equitable. Stertz further represented that Dorros and Anwar were in favor of the transfer of technology from ESS to AVE. The representations made by Stertz were false, he knew they were false when they were made, and they were designed to induce the shareholders to take action. It was not until later that the plaintiffs discovered that the defendants, including Stertz, were in possession of material information that was not disclosed to the plaintiffs. Boneau voted against the sale, Hidalgo abstained, and Stertz voted in favor and represented to the parties present that

he had proxies from Dorros and Anwar. Although Stertzter reported that the shareholders approved of the transfer, the transfer was void because, among other things, the necessary vote under California law was not obtained.

35. At this same meeting, Stertzter purported to remove Boneau and Hidalgo as directors of ESS and purported to elect Dorros, Jendersee, and Speers (who was Stertzter's office manager) to the board of ESS. Miller continued to maintain the books and records of ESS. As a result, Stertzter, Dorros, Speers, Jendersee, and Miller had purportedly and illegally accomplished their goal — the technology had been allegedly transferred to AVE, and they controlled what remained of ESS.

36. Furthermore, the defendants and co-conspirators altered the minutes of the meeting, all in furtherance of the fraud and breaches of fiduciary duty alleged in this Amended Petition. Subsequent to the meeting, Stertzter recognized that the vote at the May 27, 1993 meeting was illegal and, consequently, ineffective to cause the technology transfer and the change in the board of directors. He had represented to Hidalgo and Boneau at the meeting that he had Anwar's proxy when, in fact, he did not. Therefore, Stertzter, Jendersee, and Miller placed calls to Anwar in Texas and represented to Anwar that (i) all shareholders had voted in favor of the transfer of the stent technology from ESS to AVE, (ii) the Boneau stent had no prospect for the future, (iii) ESS had failed to develop a delivery system for the stent, (iv) the negotiations for the sale of assets were conducted in an arms-length fashion, (v) significant efforts had been made to "auction" ESS and/or the stent to third parties without success, and (vi) the value to be received by ESS and its shareholders (including Anwar) was fair and equitable. It was not until later that the plaintiffs discovered that the defendants, including Stertzter, were in possession of

material information that was not disclosed to the plaintiffs. These representations were made for the purpose of inducing Anwar to send his proxy from Texas to California, and to approve of Stertzer's plans. Anwar relied upon the representations and delivered his proxy to Stertzer, who then back-dated it to May 27, 1993. It was not until later that Anwar discovered that the representations were false and that Stertzer knew they were false when he made them.

37. The plaintiffs believe, and upon information and belief allege, that Stertzer, Dorros, Miller, Jendersee, and AVE had determined, as early as 1991, that the Boneau stent had great commercial value and presented a significant benefit to the owner of the technology rights. This information was concealed from Anwar and Hidalgo.

Termination of the Royalty Agreement

38. Although Stertzer, Dorros, Miller, and Jendersee succeeded in improperly obtaining the stent technology from ESS, the royalty obligation remained. The plaintiffs believe, and upon information and belief allege, that the defendants were aware of the value of the royalty rights, that this value would flow to all of the shareholders of ESS (including plaintiffs), and not to defendants as shareholders of AVE, and that the existence of the royalty agreement could prevent defendants from maximizing their financial interest in AVE. As a result, they developed a plan to transfer those royalty rights to their controlled corporation AVE. To accomplish this scheme, they agreed among themselves to cause each of the plaintiffs to exchange shares of ESS for shares of AVE at less than fair value. This would give each of them a proportionately higher interest in the combined enterprise because of their ability to control AVE. The Founders Agreement provided the foundation for this plan because those shareholders already had agreed among themselves that they would not dilute their control over AVE. The only impediment to

this scheme was the remaining shareholders of ESS — Anwar, Hidalgo, and Boneau — who collectively controlled over 51% of the shares but were neither directors nor officers of ESS.

39. After the May 27, 1993 meeting, Stertz, Miller, Dorros, and Jendersee agreed that an effort would be made to have AVE acquire the outstanding shares of ESS and ultimately extinguish the royalty agreement. Stertz, Jendersee, and Miller contacted Anwar in Texas and represented that (i) an exchange of shares of ESS for AVE shares made business sense because it allowed the company to avoid double taxation, (ii) each shareholder of ESS would receive the same number of shares, (iii) the exchange would be based upon the fair value of ESS, and (iv) after the exchange, the former shareholders of ESS would own AVE in proportion to the respective values of the businesses at the time of the sale. That is, Stertz, Jendersee, and Miller represented to Anwar that none of the defendants would use their control over AVE to appropriate the value of ESS to their own benefit.

40. These representations were made by the defendants to Anwar in Texas, they were made for the purpose of inducing him to exchange his shares of ESS for shares of AVE, and Anwar reasonably relied upon those representations. At the time these representations were made, Stertz, Dorros, Jendersee, and Miller were officers, directors, and/or controlling shareholders of both ESS and AVE, and in their respective ESS capacities, each owed a duty of highest good faith to ESS and its shareholders, had the affirmative obligation to insure that any exchange was entirely fair, had the duty to make full and complete disclosure of all material information to Anwar and Hidalgo, and as fiduciaries, had the obligation to elevate the interests of Anwar and Hidalgo over their own. They represented to Anwar and Hidalgo, and specifically to Anwar in Dallas, Texas, that each shareholder of ESS would be treated equally and fairly in

the exchange, that the exchange would be entirely fair to each shareholder of ESS, and that none of the defendants would use their then-existing holdings in AVE to dilute the value of the assets being conveyed from ESS to AVE. In short, the defendants agreed to structure the transactions such that the value each of the ESS shareholders had in ESS would not be diluted by virtue of the transaction with AVE.

41. During the period of May 1993 through the Fall of 1994, Stertzer, Miller, Jendersee, and Dorros attempted to persuade Anwar and Hidalgo to exchange their shares in ESS for AVE stock. Miller represented that ESS shares were worth no more than \$40,000.00 and that at the time, AVE shares were worth \$2/share. During this period, the defendants continued to make representations to Anwar and Hidalgo that any exchanges would be entirely fair, that each of the shareholders in ESS would be treated equally and the same, and that no one would derive any benefit by virtue of the transfer of the stent technology from ESS to AVE except in proportion to their respective ownership interests in ESS.

42. In an effort to induce the exchange, the defendants Stertzer, Dorros, Miller, Jendersee, and AVE concealed from Anwar and Hidalgo material information that they had a duty to disclose, including the following:

- a. The commercial value of the Boneau stent technology;
- b. AVE's stated business goal in acquiring the stent technology;
- c. The commercial viability of the Boneau stent technology;
- d. The economic prospects for the Boneau stent technology, the value of the delivery system developed in the joint venture, actual and forecasted sales of stents (and anticipated royalties), the value of ESS, and the value of AVE;

e. The fact that Stertz, Dorros, Miller, and Jendersee had not conducted an evaluation to determine the fairness of any exchange of shares when in fact they had so represented;

f. The nature and extent of the individual defendants' respective holdings in AVE, the impact those holdings would have on Anwar and Hidalgo once the stent technology had been transferred, and the existence of the various shareholder agreements between the founding members, which guaranteed that Anwar and Hidalgo would suffer extensive dilution in their respective interests in the stent technology in the exchange;

g. The individual defendants had secretly agreed among themselves to not permit dilution of their interests in, and ability to control, AVE;

h. As early as 1991, the defendants had evaluated the stent's market value and potential marketability and had concluded that the stent would generate significant profits in its very first year of sales activity;

i. Early valuations of AVE (based upon ESS's stent technology) were valued at over \$1,000,000.00;

j. At the time of Anwar's and Hidalgo's ESS/AVE exchanges, stent sales had begun in significant amounts;

k. At the time of Anwar's and Hidalgo's ESS/AVE exchanges, AVE's existing projections of future stent sales showed that stent sales would reach astronomical heights;

l. At the time of Anwar's and Hidalgo's ESS/AVE exchanges, royalties payable by AVE under contract to ESS had begun to accrue on actual stent sales in

substantial amounts and, based upon then existing productions of future stent sales, would continue to accrue to ESS, and thus to the benefit of Anwar and Hidalgo as ESS shareholders, in the foreseeable future; and

m. At the time of Anwar's and Hidalgo's ESS/AVE exchanges, the individual defendants had secretly agreed that Stertz and Dorros would soon thereafter receive in exchange for their ESS shares additional AVE shares disguised as payments to "clinical consultants" and that Jendersee and Miller would soon thereafter receive substantial additional shares at no current cash cost to them.

43. During the same period, AVE, through Stertz, Jendersee, and Miller, made representations to Hidalgo in Dallas, Texas, which were designed to induce Hidalgo to exchange his ESS shares, including:

a. There were significant problems with the Boneau stent, and the commercial value viability of the stent was negligible; and

b. The exchange of 30,000 shares of AVE stock in exchange for Hidalgo's 33 1/3% interest in ESS was entirely fair to Hidalgo, and all ESS shareholders were and would be treated equally in the exchange.

44. During this period, the defendants had agreed among themselves to keep confidential information about AVE, its officers, directors and consultants, its business prospects and plans, and agreed not to disclose details of such to anyone, including other shareholders and the plaintiffs. In fact, the defendants punished those who disclosed this information without the defendants' approval.

45. Actual commercial sales of the Boneau stent, and its progeny, started prior to the end of AVE's 1994 fiscal year. By November 1994, defendants knew that sales of the Boneau stent were going to exceed their wildest expectations, but each defendant concealed this information from Anwar, Hidalgo, and ESS. In fact, before the end of 1994, AVE had already achieved sales of approximately \$1,800,000 of the stent product and projected rapidly increasing sales for the future. None of this information was disclosed to the plaintiffs. By late 1994, the only real value in AVE was the Boneau stent technology rights and assets taken from ESS.

46. At the same time, the defendants concealed and misrepresented (i) their extensive ownership interests in AVE, (ii) their plan to increase their ownership interests in AVE through issuances of AVE shares and grants of AVE options, which had the effect of diluting the value of other shareholders and increasing the value of their own interests, and (iii) information about the business of AVE. The plaintiffs believe, and upon information and belief allege, that the shares and/or options were issued for improper purposes, represented a breach of the fiduciary duties owed by the defendants to the plaintiffs, and in particular, breached the duty of loyalty.

47. Anwar relied upon the representations and promises made by Stertzer, Dorros, Jendersee, Miller, and AVE. On November 11, 1994, he accepted the defendants' offer and contractually exchanged his 15% interest in ESS for what was represented to be \$40,000 in value of AVE stock.

48. Hidalgo relied upon the representations and promises made by Stertzer, Dorros, Jendersee, Miller, and AVE. On or about January 23, 1995, he accepted the defendants' offer and contractually exchanged his 33.33% interest in ESS for 30,000 shares of stock in AVE. At the time of the exchange, AVE also induced Hidalgo to give up options for 100,000 shares of

AVE stock, exercisable at \$.01 per share, in return for a cash payment to him of \$100,000.

Hidalgo believes, and upon information and belief alleges, that this agreement was induced by fraud. He was told by Stertz, Dorros, Jendersee, Miller and AVE that this was the most that they would pay and that if he did not accept the proposal, they, as controlling shareholders of ESS, would insure that he would not derive the benefit of his shares. They did not provide information to him that would have disclosed the real value of ESS and AVE and, had the defendants done so, Hidalgo would not have agreed to the exchanges on those terms.

49. Anwar and Hidalgo later learned that Boneau exchanged his 3.33% interest in ESS for 50,000 shares of AVE stock and \$50,000 in cash. Had the same transaction been offered to the plaintiffs, Anwar would have received over 225,000 shares (and \$225,000 in cash) and Hidalgo would have received over 500,000 shares (and \$500,000 in cash).

50. The defendants, who owed fiduciary responsibilities to Anwar, Hidalgo, and ESS, were treated differently, and the plaintiffs believe, and upon information and belief allege, that this was the plan from the beginning. First, Stertz and Dorros received substantially more shares and value in the exchange than did Anwar and Hidalgo. Second, Stertz, Dorros, Jendersee, and Miller caused millions of shares of stock in AVE to be issued to themselves (and other insiders) for a consideration of less than \$1 per share. The plaintiffs allege that this was pursuant to the Founders Agreement, which was never disclosed to the plaintiffs. Shortly thereafter, AVE, as a controlling shareholder of ESS, effectuated a merger of ESS into AVE, thus purportedly terminating any obligation to pay royalties to ESS from sales of the stent products. This purported merger was obtained through the fraud of defendants, who stood to profit, and in fact profited, from the unlawful merger.

51. After the exchange of ESS and AVE shares, the defendants continued to increase their holdings in AVE through the issuance of shares and the grant of options without paying fair value, which had the effect of further diluting the interests of Anwar and Hidalgo. These shares were issued, plaintiffs allege, as additional compensation to the defendants at the expense of the plaintiffs, in furtherance of the agreement concealed from the plaintiffs, and in violation of the defendants' fiduciary duties to the plaintiffs.

52. In or about April 1996, AVE made an initial public offering of its stock. The stock was initially priced at \$21 per share and has risen to a price in excess of \$66.50 per share. In the initial offering, Stertzler sold 116,199 shares and received approximately \$2,269,000 and yet retained 2,932,225 shares with a value in excess \$194,992,962.5 at the stock price of \$66.50 per share. Dorros sold 131,186 shares and received approximately \$2,562,000 and yet retained 2,764,872 shares worth in excess of \$183,863,988 at the stock price of \$66.50 per share. Miller sold 169,593 shares and received approximately \$3,300,000 and yet retained 2,326,530 shares with a value in excess of \$154,714,245 at the stock price of \$66.50 per share. And Jendersee sold 181,025 shares and realized \$3,535,000 and yet retained 1,877,551 shares valued at over \$124,857,141.5 at the stock price of \$66.50 per share.

53. The plaintiffs did not discover the defendants' conduct, including the fraud and misrepresentations and omissions, until AVE filed its registration statement with the Securities and Exchange Commission in or around February 1996 and furnished a copy to the plaintiffs. Alternatively, the plaintiffs could not have discovered the conduct and the fraud through the exercise of due diligence because the fraud and breaches of duty alleged herein were concealed

by the defendants. Accordingly, plaintiffs assert the discovery rule and fraudulent concealment as a defense to any limitations claim asserted by the defendants.

54. On March 15, 1996, the plaintiffs demanded that Stertzer (the purported chief executive officer of ESS), AVE (the purported owner of all of the ESS stock), Jendersee, Dorros, and Miller rescind the attempted transfer of the ESS stent technology that ESS's assets (including the stent technology) be returned to ESS, that the exchange of the AVE and ESS shares be rescinded, that the merger of ESS into AVE be rescinded, that the stent patent and all "inventions" relating thereto be returned to ESS, and that monetary damages be paid to the plaintiffs. The defendants have rejected this demand and have otherwise failed to act. Any further attempt to obtain the approval of the ESS board of directors or shareholders to bring an action on behalf of ESS would be futile.

Count I - Fraud

55. The plaintiffs incorporate herein by reference paragraphs 1 through 54 of this Amended Petition.

56. Each of the defendants, acting in concert with and through their attorneys at the time, made untrue representations of fact to plaintiffs Anwar and Hidalgo and omitted to state facts necessary to make the statements made, under the circumstances under which they were made, not misleading. The defendants misrepresented and omitted facts concerning, among others: (i) the business and affairs of AVE and ESS, including the financial relationships between such companies, (ii) the prospects for ESS and the Boneau stent, (iii) the prospects and value of ESS and AVE, (iv) the value and fairness of the exchange of shares whereby ESS shares were exchanged for AVE shares, (v) the individual defendants' relative ownership and control of

AVE, and (vi) all information in their possession or within their control that bore upon value, prospects, past evaluations, and other information required to be disclosed by fiduciaries.

Moreover, the defendants' omissions included, but were not limited to, the following material facts:

(i) that the individual defendants had secretly agreed among themselves to not permit dilution of their interests in, and ability to control, AVE;

(ii) that the individual defendants (who controlled both ESS and AVE) developed a secret plan early on to divert the stent technology away from ESS and to AVE;

(iii) that, as early as 1991, defendants had evaluated the stent's market value and potential marketability and had concluded that the stent would generate significant profits in its very first year of sales activity;

(iv) that early valuations of AVE (based upon ESS's stent technology) reflected values in millions of dollars;

(v) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, stent sales had begun in significant amounts;

(vi) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, AVE's existing projections of future stent sales showed that stent sales would reach astronomical heights;

(vii) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, royalties payable by AVE under contract to ESS had begun to accrue on actual stent sales in substantial amounts and, based upon then existing productions of future stent sales,

would continue to accrue to ESS, and thus to the benefit of Anwar and Hidalgo as ESS shareholders, in the foreseeable future; and

(viii) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, the individual defendants had secretly agreed that Stertz and Dorros would soon thereafter receive in exchange for their ESS shares additional AVE shares disguised as payments to "clinical consultants" and that Jendersee and Miller would soon thereafter receive substantial additional shares at no current cash cost to them.

Each of the defendants were agents of the other defendants and expressly or impliedly authorized the conduct of the other defendants or failed to take steps to rectify the breaches of duty whenever they had an opportunity to do so.

57. The representations of each of the defendants were false when made and were made with knowledge of their falsity or with reckless disregard of their falsity.

58. The false statements and omission of facts were made in order to, among other things: (i) induce plaintiffs Anwar and Hidalgo to exchange their ESS shares for AVE shares in late 1994 and early 1995, respectively, (ii) induce the plaintiffs to not oppose the transfer of technology from ESS to AVE, and (iii) to eliminate the plaintiffs' rights to exercise their individual rights as shareholders of ESS, including the individual right to a meaningful vote on the transfer.

59. Plaintiffs Anwar and Hidalgo reasonably relied to their detriment upon the omissions, misstatements, and misrepresentations made by each of the defendants. As a direct and proximate result of the defendants' conduct, each of the plaintiffs has been injured. Each of the plaintiffs seeks monetary damages in an amount sufficient to fully compensate him for the

harm sustained. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count II - Negligent Misrepresentation

60. The plaintiffs incorporate herein by reference paragraphs 1 through 59 of this Amended Petition.

61. Each of the defendants, acting in concert with and through their attorneys at the time, made untrue representations of fact to plaintiffs Anwar and Hidalgo and omitted to state information necessary to make the statements made, under the circumstances under which they were made, not misleading. The defendants misrepresented and omitted facts concerning, among others: (i) the business and affairs of AVE and ESS, including the financial relationships between such companies, (ii) the prospects for ESS and the Boneau stent, (iii) the prospects and value of ESS and AVE, (iv) the value and fairness of the exchange of shares whereby ESS shares were exchanged for AVE shares, (v) the individual defendants' relative ownership and control of AVE, and (vi) all information in their possession or within their control that bore upon value, prospects, past evaluations, and the other information required to be disclosed by fiduciaries. The defendants' omissions included, but were not limited to, the following material facts:

- (i) that the individual defendants had secretly agreed among themselves to not permit dilution of their interests in, and ability to control, AVE;
- (ii) that the individual defendants (who controlled both ESS and AVE) developed a secret plan early on to divert the stent technology away from ESS and to AVE;

(iii) that, as early as 1991, defendants had evaluated the stent's market value and potential marketability and had concluded that the stent would generate significant profits in its very first year of sales activity;

(iv) that early valuations of AVE (based upon ESS's stent technology) reflected values in millions of dollars;

(v) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, stent sales had begun in significant amounts;

(vi) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, AVE's existing projections of future stent sales showed that stent sales would reach astronomical heights;

(vii) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, royalties payable by AVE under contract to ESS had begun to accrue on actual stent sales in substantial amounts and, based upon then existing productions of future stent sales, would continue to accrue to ESS, and thus to the benefit of Anwar and Hidalgo as ESS shareholders, in the foreseeable future; and

(viii) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, the individual defendants had secretly agreed that Stertz and Dorros would soon thereafter receive in exchange for their ESS shares additional AVE shares disguised as payments to "clinical consultants" and that Jendersee and Miller would soon thereafter receive substantial additional shares at no current cash cost to them.

62. The defendants made those misrepresentations (and failed to disclose information) negligently, either without exercising reasonable care to determine their truth or falsity or in bad faith, and/or with no intent to act in accordance with the representations and/or omissions.

63. These negligent misrepresentations and/or omissions were made in order to induce the plaintiffs to rely upon the defendants in approving or not opposing the sale or transfer of technology from ESS to AVE, the liquidation of ESS, and the transfer of ESS shares in exchange for AVE shares and to impair the plaintiffs' rights as shareholders of ESS. The plaintiffs reasonably relied to their detriment upon the omissions, false statements, and misrepresentations made by each of the defendants, and as a direct and proximate result of the defendants' conduct, each plaintiff has suffered substantial injuries. Accordingly, each plaintiff seeks monetary damages in an amount sufficient to fully compensate him for the harm he has suffered. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count III - Violation of the Texas Securities Act

64. The plaintiffs incorporate herein by reference paragraphs 1 through 63 of this Amended Petition.

65. AVE is and was an issuer of AVE stock and a purchase of ESS stock, and consequently, is covered by the Texas Securities Act. The acts and practices alleged in this Amended Petition, including the untrue statements of material fact and the omission of material facts in connection with the issuance of AVE shares to plaintiffs and the acquisition from plaintiffs of ESS shares for AVE shares, constitute violations of section 33 of the Texas Securities Act.

66. Defendants are liable to plaintiffs under section 33 of the Texas Securities Act to return to plaintiffs the shares of ESS stock referred to above, in consideration of which plaintiffs tender the shares of AVE stock received thereby as set forth above.

67. As a proximate result of defendants' violations of section 33 of the Texas Securities Act, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count IV - Violation of Tex. Bus. & Comm. Code §27.01 et seq.

68. The plaintiffs incorporate herein by reference paragraphs 1 through 67 of this Amended Petition.

69. The defendants made untrue representations of material fact to plaintiffs Anwar and Hidalgo and omitted to state information necessary to make the statements made, under the circumstances under which they were made, not misleading. In an ongoing course of fraudulent conduct designed ultimately to obtain all of ESS's shares, the defendants' misrepresented and omitted facts concerning, among others: (i) in connection with the transfer of the ESS stent technology to AVE in early 1993, the business affairs of AVE and ESS and the financial relationships between such companies; and (ii) in connection with the exchanges by Anwar and Hidalgo of their ESS shares for AVE shares, the prospects for ESS and the Boneau stent, the prospects and value of ESS and AVE, the value and fairness of the exchanges of shares whereby ESS shares were exchanged for AVE shares, the individual defendants' relative ownership and control of AVE, including the full extent of Stertzer's and Dorros's AVE ownership, and all

information in their possession or within their control that bore upon value, prospects, past evaluations, and the other information required to be disclosed by fiduciaries. This ongoing fraudulent course of conduct was consummated in mid-1995 when AVE acquired all of ESS's shares outstanding and then merged ESS into AVE and out of existence. Moreover, the defendants' omissions included, but were not limited to, the following material facts:

- (i) that the individual defendants had secretly agreed among themselves to not permit dilution of their interests in, and ability to control, AVE;
- (ii) that the individual defendants (who controlled both ESS and AVE) developed a secret plan early on to divert the stent technology away from ESS and to AVE;
- (iii) that, as early as 1991, defendants had evaluated the stent's market value and potential marketability and had concluded that the stent would generate significant profits in its very first year of sales activity;
- (iv) that early valuations of AVE (based upon ESS's stent technology) reflected values in millions of dollars;
- (v) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, stent sales had begun in significant amounts;
- (vi) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, AVE's existing projections of future stent sales showed that stent sales would reach astronomical heights;
- (vii) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, royalties payable by AVE under contract to ESS had begun to accrue on actual stent sales in

substantial amounts and, based upon then existing productions of future stent sales, would continue to accrue to ESS, and thus to the benefit of Anwar and Hidalgo as ESS shareholders, in the foreseeable future; and

(viii) that, at the time of Anwar's and Hidalgo's ESS/AVE exchanges, the individual defendants had secretly agreed that Stertz and Dorros would soon thereafter receive in exchange for their ESS shares additional AVE shares disguised as payments to "clinical consultants" and that Jendersee and Miller would soon thereafter receive substantial additional shares at no current cash cost to them.

70. The representations of each of the defendants were false when made and were made with knowledge of their falsity or with reckless disregard of their falsity.

71. The false statements were made in order to, among other things: (i) induce the plaintiffs to exchange the ESS shares for AVE shares, (ii) induce the plaintiffs to not oppose the transfer of technology from ESS to AVE, and (iii) to eliminate the plaintiffs' rights to exercise their individual rights as shareholders of ESS, including the individual right to a meaningful vote on the transfer.

72. Plaintiffs Anwar and Hidalgo reasonably relied to their detriment upon the omissions, false statements, and representations made by the defendants. As a direct and proximate result of the defendants' conduct, each of the plaintiffs has been injured and seeks monetary damages in an amount sufficient to fully compensate him for the harm sustained, which each alleges to be (at a minimum) an amount sufficient to restore him to the relative percentage he owned of ESS.

73. Stertz, Dorros, Jendersee, and Miller, with actual awareness of the falsity thereof, engaged in the foregoing acts and made the foregoing false promises when the false promises were material. Stertz, Dorros, Jendersee, and Miller made the false promises to the plaintiffs with the intention of not fulfilling them and for the purpose of inducing the plaintiffs to enter into the contracts. Furthermore, each of the plaintiffs relied on those false promises in entering into the contract.

74. Stertz, Dorros, Jendersee, and Miller, with actual awareness of the falsity of their foregoing representations and promises, failed to disclose the falsity of those representations and promises to the plaintiffs and benefitted from the false representations and promises made to the plaintiffs.

75. Stertz, Dorros, Jendersee, and Miller engaged in the foregoing acts and omissions, and made the foregoing false representations and false promises, all as alleged above, constituting violations of section 27.01 of the Texas Business and Commerce Code.

76. As a proximate result of Stertz's, Dorros's, Jendersee's, and Miller's violations of section 27.01 of the Texas Business and Commerce Code, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

77. Additionally, because of Stertz's, Dorros's, Jendersee's, and Miller's violations of section 27.01 of the Texas Business and Commerce Code, plaintiffs are entitled to reasonable and necessary attorneys' fees, expert witness fees, costs for copies of depositions, and costs of court.

Count V - Liability of Controlling Persons; Vicarious Liability

78. The plaintiffs incorporate herein reference by paragraphs 1 through 77 of this Amended Petition.

79. During the period covered by this Amended Petition, defendants Stertz, Dorros, Miller, and Jendersee were control persons under section 33 of the Texas Securities Act and section 25504 of the California Corporations Code, and therefore each is jointly and severally liable with AVE for AVE's conduct in the sale of securities to and the purchase of securities from plaintiffs Anwar and Hidalgo. As directors and principal executive officers of AVE, Miller and Jendersee were persons subject to liability as a matter of law under Section 25504 of the California Corporations Code, for AVE's fraudulent exchange of plaintiffs' ESS stock for AVE stock. And as controlling persons and shareholders of AVE, defendants Stertz, Dorros, Miller, and Jendersee had the power to direct or cause the direction of the management and policies of AVE and had actual power and influence over defendant AVE. They are all control persons as a matter of law, and are therefore culpable participants in AVE's wrongful acts and in each other's wrongful acts.

80. AVE was a seller, an issuer, and a purchaser under Section 33 of the Texas Securities Act and under sections 25401 and 25504 of the California Corporations Code, in connection with the issuance and sale of AVE shares to Anwar and Hidalgo and in connection with the acquisition of ESS shares from Anwar and Hidalgo. Each such sale, purchase, and exchange, was accomplished by means of making untrue statements of material fact or by failing to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Therefore, AVE is liable to plaintiff

Anwar and Hidalgo. That being so, defendants Miller, Stertz, Dorros, and Jendersee are also jointly and severally liable to plaintiffs for AVE's wrongful acts under section 33 of the Texas Securities Act and under section 25504 of the California Corporations Code.

81. As a proximate result of Stertz's, Dorros's, Jendersee's, and Miller's violations of Section 33 of the Texas Securities Act and section 25504 of the California Corporations Code, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count VI - Aider and Abetter Liability of
Stertz, Dorros, Jendersee, and Miller

82. The plaintiffs incorporate herein by reference paragraphs 1 through 81 of this Amended Petition.

83. The plaintiffs allege that defendants Stertz, Dorros, Jendersee, and Miller, directly or indirectly with the intent to deceive or defraud, or with reckless disregard for the truth or the law, materially aided and assisted AVE in perpetrating the fraud upon plaintiffs Anwar and Hidalgo.

84. Therefore all are jointly and severally liable with AVE for the fraudulent issuance and sale by AVE of the AVE shares in the exchange of AVE shares for ESS shares by means of untrue statements or omissions and for the purchase of ESS shares in that transaction.

85. As a proximate result of Stertz's, Dorros's, Jendersee's, and Miller's aiding, assisting, and abetting AVE and perpetrating a fraud upon plaintiffs, plaintiffs have been

damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count VII - Civil Conspiracy

86. The plaintiffs incorporate herein by reference paragraphs 1 through 85 of this Amended Petition.

87. Each of the defendants, with the active assistance and participation by their attorney at the time, including Blumenthal and Eakin, agreed and/or conspired with each other to (i) breach the fiduciary duties owed by each to Anwar, Hidalgo, and ESS, (ii) conceal the true value of the ESS technology rights, the value of the business, its patent potential, and its prospects for the future, (iii) conceal material information about AVE and ESS, and (iv) appropriate the value of ESS owned by the plaintiffs for their own use and benefit, (v) commit common-law fraud, (vi) violate section 33 of the Texas Securities Act, (vii) violate Texas Business & Commerce Code § 27.01, *et seq.*, (viii) commit constructive fraud, (ix) breach contracts, (x) violate California Corporations Code § 25401, *et seq.*, (xi) breach the covenant of good faith and fair dealing, and (xii) violate California Corporations Code § 25000 *et seq.*

88. Each of the defendants, and others not made defendants in this Amended Petition, including James Eakin and Richard Blumenthal, participated in the conspiracy and performed acts, made statements, and concealed information, all in furtherance of such conspiracy. These acts included, without limitation, advising the defendants in their transactions with the plaintiffs, in a manner and at a time when the defendants and co-conspirators had disabling conflicts of interests.

89. Each of the defendants and co-conspirators combined to accomplish an unlawful purpose and/or a lawful purpose through unlawful means.

90. Each plaintiff has been injured as a direct and proximate result of the illegal conspiracy and conduct described above. Each plaintiff therefore seeks damages in an amount sufficient to compensate him. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count VIII - Breach of Fiduciary Duty

91. The plaintiffs incorporate herein by reference paragraphs 1 through 90 of this Amended Petition.

92. Stertz, Dorros, Jendersee, Miller and AVE owed fiduciary duties to Anwar and Hidalgo by virtue of their roles as controlling shareholders, directors, and/or officers of ESS and their relationships with the plaintiffs, including Miller's relationship as an accountant and financial advisor.

93. AVE owed a fiduciary duty to Anwar and Hidalgo as shareholders of ESS: (1) as the holder of a significant amount of the ESS shares directly, or indirectly through Stertz and Dorros; and (2) as a result of the officer and director positions in ESS held by AVE's officers, shareholders, and directors. AVE also owed a fiduciary duty to the plaintiffs by virtue of the royalty agreement, and the obligations and responsibilities in such agreement.

94. The foregoing acts and omissions of Stertz, Dorros, Jendersee, Miller and AVE, as alleged in this Amended Petition, including the untrue statements of material facts, the failure to disclose material facts, the self-dealing, the appropriation of the value owned by the plaintiffs in ESS, and the failure to insure that each transaction under the circumstances was entirely and

inherently fair to the plaintiffs, including ESS, from the standpoints of both price and procedure, constitute a breach of the duties each defendant owed to the plaintiffs.

95. Each defendant was a knowing participant in the breaches of fiduciary duty. Hence, each defendant is fully liable for such breaches. Alternatively, each defendant and the co-conspirators aided and assisted the other defendants in breaching such duties.

96. As a proximate result of defendants' breaches of fiduciary duties, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count IX - Constructive Fraud

97. The plaintiffs incorporate herein by reference paragraphs 1 through 96 of this Amended Petition.

98. Both fiduciary and special relationships, which give rise to legal or equitable duties, existed between plaintiffs and Stertz, Dorros, Jendersee, and Miller. As the controlling person of ESS, the person who controlled Director Speers from May 27, 1993, and as a controlling shareholder of ESS, Stertz had both fiduciary and special relationships with plaintiffs. Dorros, as a Director of ESS from May 27, 1993 onward, had both fiduciary and special relationships with plaintiffs. Jendersee, as President and Director of ESS, also had both fiduciary and special relationships with plaintiffs. Miller, as Anwar's and Hidalgo's accountant and as chief financial officer of ESS, had both fiduciary and special relationships with plaintiffs. Finally, through the relationships described in this Amended Petition, AVE had both fiduciary and special relationships with plaintiffs.

99. Stertz, Dorros, Jendersee, Miller, and AVE owed legal and/or equitable duties to plaintiffs, which duties they did not fulfill.

100. The foregoing acts and omissions of Stertz, Dorros, Jendersee, Miller and AVE, as alleged in this Amended Petition, constitute constructive fraud.

101. As a proximate result of defendants' constructive fraud, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count X - Breach of Contract

102. The plaintiffs incorporate herein by reference paragraphs 1 through 101 of this Amended Petition.

103. Stertz, Dorros, Jendersee, Miller and AVE each entered into agreements with the plaintiffs, including the agreements to exchange shares of AVE stock for plaintiffs' ESS stock.

104. Stertz, Dorros, Jendersee, Miller, and AVE through such persons agreed that:

- a. The number of shares of AVE stock to be issued in such exchange to plaintiffs Anwar and Hidalgo would reflect the fair valuation of the ESS and AVE shares;
- b. The number of AVE shares would be in proportion to the value of both AVE and ESS and plaintiffs' shareholder interests in ESS;
- c. The transaction would be entirely fair; and
- d. All ESS shareholders would be treated equally and fairly.

105. In fact, the exchanges of ESS stock for shares of AVE stock unfairly and unequally diluted plaintiffs' proportionate interests in their ownership in ESS and thus the stent technology assets.

106. The foregoing acts, conduct, misrepresentations, and omissions of Stertz, Dorros, Jendersee, Miller and AVE, including their failure to insure that their promises were kept, as alleged in this Amended Petition, constitute a breach of contract.

107. As a proximate result of Stertz's, Dorros's, Jendersee's, and Miller's breach of contract, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust..

108. Defendants have asserted that a contract was formed in June 1993 to exchange Anwar's ESS shares for AVE shares. Anwar denies that a contract was formed at that time. In the unlikely event that the defendants obtain a ruling that a contract was formed in June 1993, Anwar asks that the contract be set aside and rescinded for:

- (1) common-law fraud;
- (2) statutory fraud (under Tex. Bus. & Com. Code § 27.01, et seq.);
- (3) negligent misrepresentation;
- (4) breach of fiduciary duty;
- (5) violations of the Texas Securities Act;
- (6) violations of the California Corporations Code;
- (7) civil conspiracy; or

- (8) breach of the covenant of good faith and fair dealing.

Count XI - Violation of the California Corporations Code

109. The plaintiffs incorporate herein by reference paragraphs 1 through 108 of this Amended Petition.

110. AVE is and was an issuer of AVE stock and a purchaser of ESS stock, making AVE subject to the California Corporations Code. The acts and practices alleged in this Amended Petition, including the untrue statements of material fact and the omissions of material facts in connection with the issuance of AVE shares to plaintiffs and the acquisition of ESS shares for AVE shares from plaintiffs, constitute violations of section 25401 *et seq.* of the California Corporations Code.

111. The defendants are liable to plaintiffs under section 25401 *et seq.* of the California Corporations Code.

112. As a proximate result of defendants' violations of section 25401 *et seq.*, defendants are liable to plaintiffs for damages under section 25502 of the California Corporations Code according to proof at trial. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count XII - Unregistered Securities

113. The plaintiffs incorporate herein by reference paragraphs 1 through 112 of this Amended Petition.

114. AVE's sales of securities to plaintiffs in late 1994 were made without any qualification under California Corporations Code section 25000 *et seq.* and with no exemption

therefrom. Plaintiffs therefore seek all relief permitted by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count XIII - Unjust Enrichment

115. The plaintiffs incorporate herein by reference paragraphs 1 through 114 of this Amended Petition.

116. The plaintiffs allege that defendants obtained a benefit from the plaintiffs in the exchange of shares by, among other things, fraud, duress, taking of an undue advantage, and breach of fiduciary duties. Alternatively, plaintiffs alleged that defendants received a benefit, that under the circumstances, would be unconscionable for defendants to retain.

117. The plaintiffs are entitled to damages representing the amount that the defendants were unjustly enriched. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count XIV - Rescission of the Stock Exchange Agreement

118. The plaintiffs incorporate herein by reference paragraphs 1 through 117 of this Amended Petition.

119. The Stock Exchange Agreement was procured by fraud and in breach of the fiduciary duties the defendants owed to Hidalgo. The consideration delivered to Hidalgo under the agreement, his interest in ESS exchanged for 30,000 shares of AVE stock, was not fair and reasonable consideration for the shares in ESS. Therefore, the agreement is void or voidable.

120. As a proximate result of the defendants' conduct, Hidalgo has been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount Hidalgo seeks recovery. Hidalgo further seeks all remedies allowed by law and equity, including

disgorgement, rescission of the Stock Exchange Agreement, and the imposition of a constructive trust.

Count XV - Rescission of the Separation and Release Agreement

121. The plaintiffs incorporate herein by reference paragraphs 1 through 120 of this Amended Petition.

122. The Separation and Release Agreement was obtained by fraud and in violation of the defendants' fiduciary obligations owed to Hidalgo. Therefore, the agreement is void and/or voidable.

123. As a result of the defendants' conduct, Hidalgo has been damaged in an amount in excess of the minimum jurisdictional limits of this Court for which amount he now sues. In addition, Hidalgo seeks to recover the benefit of the options to acquire stock in AVE, including the option to acquire 100,000 shares of stock of AVE (prior to the 5.5 to 1 split) for \$0.01 per share. Hidalgo therefore seeks to rescind the transaction and to exercise his rights to 550,000 shares of AVE stock (after the 5.5 to 1 split) at a purchase price of \$0.001818 per share.

124. Hidalgo further seeks all remedies allowed by law or equity, including disgorgement and the imposition of a constructive trust.

Count XVI - Breach of the Covenant of Good Faith and Fair Dealing

125. The plaintiffs incorporate herein by reference paragraphs 1 through 124 of this Amended Petition.

126. The acts and conduct of each of the defendants breached the covenant of good faith and fair dealing whereby each defendant was obligated to not interfere with each of the plaintiffs' right to obtain the benefit of his relationship with ESS and/or AVE. The defendants'

conduct breached the covenant of good faith and fair dealing by, among other actions, breaching their fiduciary obligations, failing to make disclosures as required by law, fraudulently inducing the agreements without providing information otherwise required by law, and failing to tender the performance required under the agreements.

127. The defendants were unjustly enriched at the expense of the plaintiffs. As a proximate result of Stertzner's, Dorros's, Jendersee's, Miller's, and AVE's conduct, plaintiffs have been damaged in an amount exceeding the minimum jurisdictional limits of this Court, for which amount plaintiffs seek recovery. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement, rescission, and the imposition of a constructive trust.

Count XVII - Exemplary or Punitive Damages, Damages, Constructive Trust, and Rescission

128. The plaintiffs incorporate herein by reference paragraphs 1 through 127 of this Amended Petition.

129. Each of the plaintiffs seeks monetary damages in an amount sufficient to fully compensate him for the harm sustained. Or, alternatively, each plaintiff seeks all remedies allowed by law or equity, including disgorgement.

130. Alternatively, each plaintiff seeks rescission of the purported sale of ESS assets to AVE, rescission of his exchange of ESS stock for AVE stock, and the reconstitution of ESS as a viable entity.

131. Each plaintiff seeks the imposition of a constructive trust on the benefits received by the defendants, including, without limitation, AVE shares owned by the defendants and the proceeds from the sale of AVE shares once owned by the defendants.

132. The acts and conduct of each of the defendants were intentional, willful, fraudulent, knowing, wanton, malicious, and grossly negligent and were without justification or excuse. Accordingly, each plaintiff is entitled to recover exemplary or punitive damages from each of the defendants in an amount to be determined by the trier of fact.

133. To the extent that the defendants may claim that the former version of Texas Civil Practice & Remedies Code § 41.007 may apply to limit punitive damages, the plaintiffs allege that the limitation does not apply, because the defendants' conduct falls under the former version of Texas Civil Practice & Remedies Code § 41.008.

134. To the extent that the defendants may claim that the current version of Texas Civil Practice & Remedies Code § 41.008(b) may apply to limit punitive damages, the plaintiffs allege that the limitation does not apply, because the defendants' conduct falls under the current version of Texas Civil Practice & Remedies Code § 41.008(c)(10), (11), and (13).

135. Each defendant is jointly-and-severally liable for all damages or other relief awarded.

Count XVIII - Conversion and Breach of Fiduciary Duty Against
Simon H. Stertz, M.D., John Miller, and AVE

136. The plaintiffs incorporate herein by reference paragraphs 1 through 135 of this Amended Petition.

137. Stertz inappropriately and illegally converted funds that belonged to ESS and/or Plaintiffs to his own use. Stertz accomplished this in two separate ways. First, he allowed ESS to carry on its books liabilities in the amount of \$12,500 allegedly owed to Stertz, based upon expenses Stertz claimed to have advanced on ESS's behalf, even though Stertz had been

reimbursed fully for these expenses from other sources, including Seton Medical Center, Mission Services Foundation, and/or the Lasker Fund.

138. Second, Stertzter had ESS's shareholders, including Anwar and Hidalgo, reimburse him for legal expenses in the amount of \$5,961.90 incurred by ESS, and then did not pay those shareholders back when AVE reimbursed Stertzter. Stertzter received \$2,887.30 from Anwar and Hidalgo to pay the invoice. But when AVE reimbursed him for expenses advanced on ESS's behalf, Stertzter received funds that should have gone to Anwar and Hidalgo to reimburse them for their share of the legal invoice. To this day, Anwar and Hidalgo have never been reimbursed.

139. For these reasons, \$15,387.30 of the \$27,679.00 that AVE paid to Stertzter represented monies owed to ESS and/or Anwar and Hidalgo. Stertzter kept the entire monetary distribution from AVE for his personal use. By accepting the full \$27,679.00 payment and not reimbursing ESS, Anwar, or Hidalgo, Stertzter converted at least \$15,387.30 for his personal use and to the exclusion of the rightful owners, ESS, Anwar, and Hidalgo. As a result of Stertzter's wrongful conduct, ESS, Anwar, and Hidalgo have suffered damages, at a minimum, in the amount of \$15,387.30 plus pre-judgment interest from the time of the conversion. Stertzter's actions also represent a breach of fiduciary duty owed to ESS and its shareholders.

140. John Miller and AVE aided, conspired, and facilitated Stertzter's actions by distributing payment directly to Stertzter instead of the rightful owners – ESS and its shareholders. As a result, ESS and its shareholders have suffered damages.

Count XVIII - Attorneys' Fees

141. The plaintiffs incorporate herein by reference paragraphs 1 through 140 of this Amended Petition.

142. The plaintiffs seek recovery of their attorneys' fees as allowed by law.

FOR THESE REASONS, plaintiffs Azam Anwar, M.D. and Benito Hidalgo, both individually and on behalf of ESS respectfully request that, on final hearing, plaintiffs have judgment against defendants for:

a. Damages in an amount within the jurisdictional limits of this Court in accordance with Texas procedure, which the plaintiffs allege, based upon discovery to date, is maximum monetary damages of \$398 million as of April 15, 1998 (calculated by multiplying the number of shares of AVE stock that should have been issued to the plaintiffs times the highest market value of AVE shares), plus any additional increase in the value of the AVE shares after April 15, 1998;

b. Imposition of a constructive trust on the benefits received by the defendants, including, without limitation, AVE shares owned by the defendants and the proceeds from the sale of AVE shares once owned by the defendants;

c. Disgorgement of the benefits that the defendants have wrongfully obtained or retained;

d. Exemplary or punitive damages;

e. Rescission of the purported sale of ESS assets to AVE;

f. Rescission of the exchanges of ESS stock for AVE stock;

g. Rescission of the merger of ESS into AVE, and reconstitution

of ESS as a viable entity;

h. Rescission of the June 1993 contract to exchange Anwar's ESS shares for AVE shares (in the event of a ruling that a contract was formed in June 1993);

i. Rescission of Hidalgo's Stock Exchange Agreement;

j. Rescission of Hidalgo's Separation and Release Agreement;

k. Reasonable and necessary attorneys' fees;

l. Prejudgment and postjudgment interest at the highest rates allowed by law;

m. Court costs, expert witness fees, and costs for copies of depositions; and

n. Such other and further relief, both at law and in equity, to which plaintiffs

may be justly entitled.

Respectfully submitted,

THOMPSON & KNIGHT
A Professional Corporation

By: 

Timothy R. McCormick
State Bar No. 13463500

Steven K. Cochran
State Bar No. 04454000

Stephen C. Rasch
State Bar No. 16551420

William M. Katz, Jr.
State Bar No. 00791003

1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
(214) 969-1700
(214) 969-1751 (Fax)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via hand delivery on the following counsel of record on the 28th day of October, 1998:

Charles W. Cunningham, Esq.
McKool Smith, P.C.
300 Crescent Court #1500
Dallas, TX 75201


William M. Katz, Jr.